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No. 07-513

IN THE

Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ALABAMA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with

[1] A letter of consent from Respondent to the filing of this brief has been lodged with the Clerk of the Court pursuant to Rule 37.3. Petitioner has filed a blanket letter of consent. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Alabama is one of its statewide affiliates. The ACLU has appeared before this Court in numerous cases involving the application and scope of the exclusionary rule, both as direct counsel and as *amicus curiae*. In addition, the ACLU has frequently litigated cases of police misconduct under 42 U.S.C. § 1983, both in this Court and the lower courts. We submit this brief to discuss the relationship between the exclusionary rule and civil remedies for police misconduct and, more particularly, why the possibility of a civil damage award in police misconduct cases, under either federal or state law, is not an effective substitute for the deterrent effect of the exclusionary rule.

FACTS

Bennie Herring appeals the Eleventh Circuit's decision affirming his convictions for possession of methamphetamine, 21 U.S.C. § 844(a), and for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). Herring asserted below that the district court erred when it denied his motion to suppress the drugs and gun recovered as a result of a search of Herring's vehicle.

The search of Herring's vehicle followed his visit to the Coffee County Sheriff's Department, where he had gone to retrieve personal items left in an impounded vehicle. While Herring was there, Investigator Mark Anderson—who knew Herring as a result of previous run-ins between the two—had the person in the Sheriff's Department in charge of monitoring warrants check for outstanding warrants for Herring. She found none, so Anderson then asked

her to check with her counterpart in the Sheriff's Department in neighboring Dale County. That employee reported, based on a computer search, that there was an outstanding warrant for Herring for failure to appear on a felony charge.

By the time the information was relayed, Herring had already left the Coffee County Sheriff's Department. Upon hearing that there was an outstanding warrant for Herring, Anderson and Deputy Sheriff Neil Bradley pursued, pulled over, and arrested Herring; they then searched Herring and his vehicle. Following the stop but before his arrest, Herring denied that he had an outstanding warrant.

Meanwhile, the employee in the Dale County Sheriff's Department learned that the warrant she had reported to Coffee County had been recalled five months earlier. She passed this information along, but by the time the correction reached Anderson, the drugs and gun already had been recovered.

After his indictment in the United States District Court for the Middle District of Alabama, Herring moved to have the drugs and guns suppressed as the product of an unlawful arrest in violation of the Fourth Amendment. The district court rejected Herring's motions, and Herring was subsequently convicted on both counts. Herring appealed to the Eleventh Circuit, which affirmed his conviction. *United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an illegal arrest and an invalid search. Under those circumstances, *amici* agree with Petitioner that this Court should adhere to and apply

here the century-old principle that evidence obtained in violation of the Fourth Amendment is inadmissible when that evidence was obtained as the result of the misconduct of law enforcement officials, whether intentional or negligent.

Amici also agree with the position advanced in other briefs, and therefore not repeated here, that the nationwide reliance by law enforcement on ever-expanding, inter-related and error-prone databases makes it more critical, not less, to apply the exclusionary rule as a means to encourage accurate recordkeeping by government officials.

This brief focuses on a different point. In affirming the denial of Petitioner's suppression motion, the Eleventh Circuit rested its opinion, in part, on the assertion that civil remedies could provide an effective deterrent to the constitutional violations revealed by this record without the necessity of applying the exclusionary rule. *Id*. at 1218.

Deterrence has never been the sole justification for the exclusionary rule. From the beginning, this Court has recognized that the exclusionary rule serves important constitutional principles wholly apart from its deterrent effect. On these facts, however, deterrence is a sufficient rationale to enforce the exclusionary rule simply because there is so little prospect that Petitioner will or could ever recover damages for the undisputed violation of his Fourth Amendment rights.

The obstacles to recovery under 42 U.S.C. § 1983 are substantial and, in all probability, insurmountable on this record. The arresting officers, acting on a facially valid warrant, are likely to be shielded from personal liability based on their mistaken but appar-

ently good-faith belief that Petitioner's arrest and incident search were done pursuant to a valid judicial warrant. In addition, there can be no recovery under Section 1983 for the negligent act of the law enforcement officer who made the initial error in failing to delete the revoked warrant from the computer database, even assuming that person is someday identified. *Respondeat superior* does not apply under Section 1983, so the Sheriff's Departments in Coffee and Dale Counties cannot be held accountable for the acts of their employees, nor can their senior law enforcement officials be held liable for the acts of their subordinates. In other jurisdictions, the counties might be held liable if it could be shown that their policies or practices caused Petitioner's constitutional violation, but even that possibility is foreclosed in Alabama by this Court's holding that Alabama sheriffs are officers of the state when performing their law enforcement duties and therefore shielded by the state's Eleventh Amendment immunity against damages. Finally, injunctive relief is almost certainly unavailable given the need for Petitioner to show that he will again be subject to the same constitutional violation in order to establish Article III standing.

More generally, there is little evidence to show that Section 1983 actions are an effective deterrent against police misconduct, even when they are successful. The available evidence demonstrates to the contrary, in part because of indemnification rules and in part because of political imperatives that typically compel continued funding of even recalcitrant police departments.

The prospects for civil relief are no better under Alabama state law than under Section 1983 and the deterrent effect of state tort litigation is, therefore,

equally slight. Individual law enforcement officers are protected by a sweeping immunity provided by state constitutional and statutory provisions. Alabama sheriffs cannot be held liable for their subordinates' actions based on existing precedent. Sheriff's Departments cannot be sued because they are not recognized by Alabama law as legal entities subject to suit. Finally, Dale and Coffee Counties are shielded from liability because they are not deemed responsible under Alabama law for the law enforcement activities of their Sheriff's Departments.

Given the impediments to recovery that Petitioner would face in any civil action arising from these facts, the exclusionary rule offers the only real prospect for deterring the police misconduct that so plainly violated Petitioner's Fourth Amendment rights in this case.

ARGUMENT

I. BECAUSE OF THE BARRIERS TO CIVIL RECOVERY UNDER BOTH FEDERAL AND STATE LAW, ONLY THE EXCLUSIONARY RULE CAN PROVIDE A MEANINGFUL DETERRENT TO THE CLEAR FOURTH AMENDMENT VIOLATION IN THIS CASE.

Since this Court first announced the exclusionary rule almost one hundred years ago in *Weeks v. United States*, 232 U.S. 383 (1914), it has been a bedrock principle of Fourth Amendment law that the government may not rely on evidence seized following a warrantless arrest that is unsupported by probable cause. In departing from that principle, the Eleventh Circuit primarily relied on this Court's decision in *United States v. Leon*, 486 U.S. 897 (1984). Petitioner persuasively

demonstrates why that reliance is misplaced, beginning with the fact that the search in *Leon* was based on a judicial warrant, albeit one that was later declared invalid. Here, of course, there was no warrant at the time Petitioner was arrested and searched.

Beyond this constitutionally critical distinction, the cost-benefit analysis that the Eleventh Circuit derived from *Leon* simply does not support the conclusion that the Eleventh Circuit reached. In fact, current law makes it exceedingly unlikely that Petitioner could ever obtain damages or injunctive relief under either federal or state law, despite the clear violation of his Fourth Amendment rights. The Eleventh Circuit's claim that the exclusionary rule is an unnecessary deterrent on the facts of this case because deterrence can be achieved just as effectively through other means is a classic example of a false premise leading to a faulty conclusion.

A. 42 U.S.C. § 1983

The barriers to recovery under Section 1983 are significant for any civil rights plaintiff. On the facts of this case, the chances of a successful recovery under Section 1983 are virtually non-existent. Given the procedural and substantive obstacles described more fully below, Petitioner lacks a realistic chance of recovery. Few individuals in Petitioner's position will even bother to sue and few attorneys will be willing to undertake his case. As a result, law enforcement agencies or officials will not be deterred by either the threat or the reality of a Section 1983 suit that has little chance of success.

1. Section 1983 Is Unlikely To Provide A Remedy On The Facts Of This Case.

The Petitioner in this case was unconstitutionally arrested and subsequently convicted in federal court based on evidence seized as a result of that unconstitutional arrest. There is no doubt that Petitioner's arrest violated the Fourth Amendment. It was not supported by probable cause or a judicial warrant. The law on that point was, and is, clearly established. *E.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975). Petitioner's constitutional injury is thus undeniable. Unfortunately, Petitioner's chances of recovering under Section 1983 for that constitutional violation are slim, at best.

The arresting officers are almost certainly shielded by qualified immunity under existing law, which protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). At the time of Petitioner's arrest, the arresting officers had been told that there was a valid arrest warrant. That information turned out to be false. But absent some reason that the officers should have doubted the reliability of that information that is not apparent on the present record, the chances are overwhelming that the officers will be granted immunity on the ground that reasonable officers in their position would not have known that there was no constitutional basis for Petitioner's arrest. *See Anderson v. Creighton*, 483 U.S. 635, 646 (1987) ("The general rule of qualified immunity is intended to provide government officials with the ability 'rea-

sonably [to] anticipate when their conduct may give rise to liability for damages'") (citation omitted); *Saucier v. Katz*, 533 U.S. 194 (2001) (qualified immunity applies where a reasonable officer would have thought that the alleged act was lawful in light of clearly established law and the factual information possessed at the time). As the Third Circuit said in *Berg v. County of Allegheny*, 219 F.3d 261, 273 (3d Cir. 2000) (collecting cases), "we have generally extended immunity to an officer who makes an arrest based on an objectively reasonable belief that there is a valid warrant." Other circuits have ruled similarly.[2]

The chances of recovery are remote, as well, against the employee who failed to delete the record of Petitioner's revoked arrest warrant from the Dale County database or the employee who passed along the inaccurate information in the database to law enforcement officials in Coffee County, where Petitioner was arrested. The second employee will surely assert an immunity claim based on her "objectively reasonable belief that there [was] a valid warrant." The first employee has never been identified and, even if identified, would surely argue that the mere failure to update the computer database did not intentionally lead to Petitioner's arrest and thus did not violate the Fourth Amendment. *See Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) ("a Fourth Amendment [violation occurs] . . . only where there is governmental termination of freedom of movement *through means intentionally* applied").

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[2] *See Pickens v. Hollowell*, 59 F.3d 1203, 1207-08 (11th Cir. 1995); *Salmon v. Schwarz*, 948 F.2d 1131, 1140-41 (10th Cir. 1991); *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989); *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987).

In other circumstances, the Due Process Clause might fill in the constitutional gaps and provide a cause of action for Petitioner's deprivation of liberty. However, in *Daniels v. Williams*, 474 U.S. 327 (1986), this Court held that mere negligence does not establish a due process violation. Petitioner could, in theory, prevail on a due process claim by proving that either the failure to update the Dale County database in a timely fashion or the failure to check the files for the actual warrant before falsely informing Coffee County that there was an outstanding warrant for Petitioner's arrest demonstrated "deliberate indifference" to Petitioner's constitutional rights. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853-54 (1998). On the present record, suffice it to say, it appears that would be a very difficult claim to prove.

Petitioner would face equivalent, if not greater, difficulties in seeking to recover against other possible defendants in a civil action. Because *respondeat superior* does not apply to actions brought under Section 1983, *see Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), senior law enforcement officials cannot be held liable for the constitutional violations of their subordinates. The same would hold true for the counties themselves.

The counties can be sued for their own misconduct only if the constitutional violation was caused by an official policy or practice, *id*. at 694, or by a failure to train that amounts to deliberate indifference, *see City of Canton v. Harris*, 489 U.S. 378, 407 (1989).

One can hypothesize a lawsuit on these facts that might allege, and conceivably prove, that failure to purge the database of outdated warrants was sufficiently pervasive that it amounted to a government sanctioned practice manifesting deliberate indiffer-

ence. But even that theoretical option is foreclosed by this Court's ruling that County Sheriff's Departments in Alabama act as an arm of the state when they enforce the criminal law, and are therefore shielded by the state's Eleventh Amendment immunity. *McMillian v. Monroe County*, 520 U.S. 781 (1997). After reviewing Alabama law, the majority in *McMillian* concluded that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." *Id*. at 793.[3]

Finally, on these facts, injunctive relief under Section 1983 is as unlikely to be obtained as money damages. In *City of Los Angeles v Lyons*, 461 U.S. 95 (1983), this Court overturned an injunction issued by a lower federal court prohibiting the use of chokeholds by the Los Angeles Police Department. Lyons filed his action after he had been subjected to a chokehold during a traffic stop. The evidence further showed that more than a dozen people in Los Angeles had died as a result of police chokeholds during a five-year period. Nevertheless, the Court held that the plaintiff had no standing to seek injunctive relief because he could not "establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id*. at 105. The fact that others were subjected to, and in fact died from, the use of chokeholds did not make up for that deficiency: "The additional allegation in the complaint that the police

[3] The holding in *McMillian* applied to a county sheriff and his investigator sued in their official capacities, but the same Eleventh Amendment immunity would apply to a suit against a County Sheriff's Department sued as an entity.

in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties." *Id*.

Under *Lyons*, Petitioner would be entitled to injunctive relief only if he could show a likelihood that he would again be the subject of an arrest warrant that was later revoked but not removed from a computer database, and that this outdated information would again become the basis for his subsequent unconstitutional arrest. As numerous post-*Lyons* cases have demonstrated, that showing is nearly impossible to make.

The practical unavailability of both injunctive relief and monetary damages undercuts the lower court's mistaken premise and reinforces the importance of applying of the exclusionary rule for its deterrent effect as well as its other, important justifications.

2. More Generally, Section 1983 Actions Do Not Provide A Substitute Source Of Deterrence.

The lack of an effective Section 1983 remedy in this case is not anomalous. Section 1983 actions are far less common than motions under the exclusionary rule, have a low success rate, and, even when they do succeed, generally do not serve as effective deterrents.

The immunity doctrines and standing rules that have developed over the years have made it "far more difficult" to challenge police misconduct in a civil action than it was a generation ago. Avery, Rudovsky &

Blum, *Police Misconduct: Law and Litigation*, at v (3d ed. 2007). Even where a Section 1983 plaintiff does prevail and wins a substantial judgment against an officer or police department for a significant Fourth Amendment violation, there is no proof that such judgments have more than a negligible deterrent effect.

The reason for this lack of discernable significant deterrence may well be related to the widespread availability of indemnification to protect individual officers from the personal financial consequences of their misconduct. "States and municipalities commonly have policies authorizing indemnification of compensatory damages, with some even authorizing indemnification of punitive damages." Marin A. Schwartz, *Should Juries be Informed that Municipality Will Indemnify Officer's 1983 Liability for Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209, 1223 (2001) (discussing indemnification for compensatory and punitive damages for § 1983 violations by police officers). *See also* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urb. L.J. 587 (2000) (study of New York City concludes that state municipalities indemnify "police officers in an overwhelming majority of civil rights cases," regardless of "whether they acted intentionally, recklessly, or brutally; whether or not they violated federal or state law; or whether or not they violated the rules and regulations of the New York City Police Department").

Indemnification does not, however, mean that Police Departments themselves bear the brunt of such judgments, either directly or indirectly, in a manner that is likely to produce a deterrent effect. In the first

instance, "City council members, county boards, and city and county administrators . . . bear the financial and political cost." Miller & Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 Buff. L. Rev. 757, 782 (2004). The municipality ultimately paying the price for police misconduct will not necessarily react to an adverse judgment in the same fashion that a private, economically rational actor would, by, for instance, taking steps to prevent the economic cost in the future by pressing for a change in police conduct. Economic analysis shows that governments respond differently to monetary incentives than do individuals, and that political rather than economic theory best explains government misbehavior and the most effective avenues for reducing that behavior. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 355-57 (2000). As a result, while one might think municipalities would act as rational economic actors and extract a price from police departments for such civil judgments, instead "they may even reward police with larger budgets, since the political returns for higher police funding and appearing tough on crime may be worth the budgetary cost." Miller & Wright, *supra*, at 782.

In any event, successful suits under Section 1983 will often send a confusing message to police departments, thereby undermining any deterrent effect. Empirical studies have found that jurors take into account the criminal guilt or innocence of plaintiffs when determining damages in Section 1983 actions for Fourth Amendment violations, contrary to explicit instructions not to do so. Casper, Benedict & Perry, *Juror Decision Making, Attitudes and the Hindsight Bias*, 13 Law & Hum. Behav. 291, 300 (1989). In

other words, the severity of the judgments in Section 1983 cases will often vary based upon a factor unrelated to the severity of the Fourth Amendment violation, namely, how sympathetic the plaintiff appears to the jury. *Id*. The exclusionary rule, by contrast, is linked exactly to the conduct to be deterred.

Motions to suppress, moreover, are far more common than civil rights actions and thus serve more effectively as an ongoing monitor of police misconduct. Approximately 300,000 criminal prosecutions are dismissed or dropped each year due to the exclusionary rule. Sklansky, *Is the Exclusionary Rule Obsolete*?, 5 Ohio St. J. Crim. L. 567, 580 (2008). By contrast, 2,598 "civil rights" cases were filed in federal district courts in 2007, *see 2007 Annual Report of the Director of the Administrative Office of the United States Courts*, at Table C-3, and, of course, only a fraction of those dealt with alleged Fourth Amendment violations. Where one type of remedy—exclusion—is pursued at a rate 100 times greater than the other remedy—civil actions for Fourth Amendment violations—"there is reason to be skeptical that the second can substitute entirely for the first." Sklansky, *supra*, at 580.

In sum, the logic that Section 1983 can substitute for the exclusionary rule as a deterrent to police misconduct does not bear scrutiny: Successful Section 1983 actions are too rare, the grounds for success too fickle, and the consequences of judgment too attenuated for meaningful deterrence.

B. Alabama State Law Remedies

Alabama tort law is no more likely than Section 1983 to provide Petitioner with redress or deter Re-

spondents from repeating the same constitutional violation in the future.

1. The County Sheriff's Departments Cannot Be Held Liable Under Alabama State Law.

Petitioner cannot sue the Sheriff's Departments in either Coffee County or Dale County for the events leading to his arrest and the improper seizure of the evidence. Under Alabama law, county Sheriff's Departments are "not . . . legal entit[ies] subject to suit." *Coleman v. City of Dothan*, 598 So. 2d 873, 875 (Ala. 1992).

2. Neither The Sheriff Nor His Subordinates Could Be Subject To Civil Liability.

Likewise, under Alabama law, a Sheriff cannot be held vicariously liable for any of his subordinate's acts. *See Parker v. Amerson*, 519 So. 2d 442, 442-43 (Ala. 1987) (rejecting not only the application of the theory of *respondeat superior*, but also the legislature's attempts to impose vicarious liability by statute). Thus, even if particular employees acted in an unlawful manner, Alabama law would not permit the Sheriff to be found liable for that conduct.

A suit by Petitioner directed against the arresting officers, or any other Sheriff's Department employees, would be doomed to nearly certain failure. Section 14 of Article I of the Alabama Constitution of 1901 has been held to grant sweeping immunity to state agents. As the Alabama Supreme Court has put it: "The wall of immunity erected by § 14 is nearly impregnable." *Patterson v. Gladwin Corp*., 835 So. 2d 137, 142 (Ala. 2002).

Article I, Section 14 states: "That the State of Alabama shall never be made a defendant in any court of law or equity." Alabama courts consider a suit against a sheriff or deputy arising from the performance of his or her duties as "essentially a suit against the state." *Ex parte Blankenship*, 893 So. 2d 303, 305 (Ala. 2004). Therefore, where the sheriffs and deputies were acting within the scope of their employment, they are immune from liability. *Ex parte Sumter County*, 953 So. 2d 1235, 1239 (Ala. 2006) (citing *Ex parte Purvis*, 689 So. 2d 794, 795 (Ala. 1996)); *Ex parte Woodward*, 859 So. 2d 425, 427 (Ala. 2003); *Caldwell v. Brogden*, 678 So. 2d 1148, 1150-51 (Ala. Civ. App. 1996) (sheriff's deputy immune from state law suit and § 1983 claim for erroneous arrest based on warrant and deputy's conclusions regarding a fraudulent check).

Indeed, Alabama courts have held expressly that the immunity doctrine applies when the state-agent "exercis[es] judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons." *Ex parte Hudson*, 866 So. 2d 1115, 1119-20 (Ala. 2003) (quoting *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000)). There are only a limited number of enumerated exceptions to this immunity, none of which apply here.[4]

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[4] The five enumerated exceptions to this broad grant of immunity from suit are actions "(1) to compel [the sheriff] to perform his duties; (2) to compel him to perform ministerial acts; (3) to enjoin him from enforcing unconstitutional laws; (4) to enjoin him from acting in bad faith, fraudulently, beyond his authority, or under mistaken interpretation of the law, or (5) to seek construction of a statute under the Declaratory Judgment Act if he is a necessary party for the construction of the statute."

The Alabama Legislature has provided a similar statutory immunity for discretionary acts by "peace officers." Ala. Code § 6-5-338(a); *Ex parte Kennedy*, ___ So. 2d ___, No. 1061377, 2008 WL 1838311, at *3-5 (Ala. Apr. 25, 2008).[5] The statute precludes liability for "those acts as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances." *Thurmond v. City of Huntsville*, 904 So. 2d 314, 319 (Ala. Civ. App. 2004) (internal quotation marks and citations omitted). Pursuant to this provision, the Alabama Supreme Court has shielded law enforcement officials from liability based on alleged negligence (as well as intentional assault, battery, and wrongful death). *See id.*; *Ex parte Kennedy*, 2008 WL 1838311, at *1. The exceptions to this statutory immunity are extremely narrow. *Giambrone v. Douglas*, 874 So. 2d 1046, 1048 (Ala. 2003) (for immunity to be withheld, plaintiff must show that the defendant acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority). The circumstances before the Court would not fall within any exception.

Alexander v. Hatfield, 652 So. 2d 1142, 1143 (Ala. 1994) (internal quotation marks omitted). None of these exceptions allow for damages or other forms of compensation that might, in theory, provide some deterrent effect.

[5] Section 6-5-338(a) reads in relevant part as follows:

> (a) Every peace officer, . . . whether appointed or employed as such peace officer by the state or a county or municipality thereof, . . . shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties.

In sum, state-agent immunity—constitutional, statutory or both—would bar a suit by anyone in Herring's shoes who sought damages from the individuals who acted in apparent good faith to enforce a warrant that appeared valid.

3. The Counties In These Cases Cannot Be Held Liable Under Alabama State Law.

Closing the door further on a potential tort suit, neither Coffee County nor Dale County can be held liable under Alabama state law in this case. While "[a]n Alabama county . . . is not generally immune from suit," *Ex parte Sumter County*, 953 So. 2d at 1238, the counties' relationship to the Sheriff's Departments effectively shield the counties from any liability under the facts of this case. "In Alabama, counties possess only those powers expressly delegated to them by the legislature," *id*., and the actions of the individual sheriffs or the deputies cannot be imputed to the counties, because a "sheriff is not an employee of a county for the purposes of imposing liability on the county" under a *respondeat superior* theory. *Id*. at 1238-39 (citing Art. V, § 112 of the Alabama Constitution of 1901[6]); *Coleman*, 598 So. 2d at 875; *White v. Birchfield*, 582 So. 2d 1085, 1087 (Ala. 1991). This Court's holding in *McMillian* relied on these state law provisions, among others, in cloaking Alabama

[6] Article V, § 112 of the Alabama Constitution of 1901 reads as follows: "The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and *a sheriff for each county*." (Emphasis added.)

sheriff's with the state's Eleventh Amendment immunity. 520 U.S. at 786-93.

* * *

The exclusionary rule has been a vital part of this Court's Fourth Amendment jurisprudence since the early twentieth century. It certainly should not be abandoned in this case based on illusory claims about the deterrent effect provided by civil remedies that are effectively unavailable to Herring or anyone else in a similar situation.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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